IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-876

UNITED STATES STEEL CORPORATION,
Petitioner,

vs.

THE METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO, A MUNICIPAL CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO DEFENDANT'S PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

ALLEN S. LAVIN,
100 East Erie Street,
Chicago, Illinois 60611,
312—751-5686,
Attorney for Respondent.

LEONARD M. RING,
111 West Washington Street,
Suite 1333,
Chicago, Illinois 60602,
312—332-1765,
Special Counsel.

Of Counsel:
LEONARD M. RING,
PHILLIP ROTHENBERG,
RALPH L. BRILL.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

INDEX.

List of Authorities Cited.

Cases—Federal.

Cases—State.

Statutes.

Law Reviews.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No.

UNITED STATES STEEL CORPORATION,
Petitioner,

vs.

THE METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO, A MUNICIPAL CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO DEFENDANT'S PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

PREFATORY STATEMENT.

Since 1967, the Metropolitan Sanitary District of Greater Chicago has pursued a carefully planned enforcement program in the Illinois courts to abate the industrial pollution of Lake Michigan. These actions have been prosecuted against the major industrial polluters of Lake Michigan, and have been based on theories of common law nuisance, and the Sanitary District's special statutory authority (Illinois Rev. Stat., Chapter 42, §§ 326, 326a and 326bb).

These lawsuits have, for the most part, resulted in the entry of significant consent decrees, whereby the pollution defendants

have agreed to install advanced pollution control equipment. These decrees include: *People of the State of Illinois and Metropolitan Sanitary Dist.* v. *United States Steel Corp.*, 69CH3334, 67CH5772 (U. S. Steel South Works, Chicago; $30 million recycling system installed); *Metropolitan Sanitary District and People of the State of Illinois* v. *Interlake, Inc.*, 69CH3533, 70CH937 ($10 million recycling system installed); *People of the State of Illinois and Metropolitan Sanitary District* v. *Republic Steel Corp.*, 69CH3675, 69CH3532 ($12 million recycling system to be completed by 1978). The Sanitary District has also filed suit against numerous Indiana industries whose discharges were polluting the Illinois waters of Lake Michigan. *Metropolitan Sanitary District* v. *Inland Steel Co., Youngstown Sheet & Tube Co., American Steel Foundry, Cities Service Oil Co., Socony-Mobil Oil Co., Lake Cities Corp., Clark Oil & Refinery, U. S. Gypsum Co., The Texas Company, Sinclair Refining Co., American Oil Co. and Union Carbide & Carbon Corp.*, 67 CH 5682. The cases against Youngstown Sheet & Tube Co. and Inland Steel Co. were later consolidated with actions brought by the Attorney General of Illinois, and resulted in consent decrees against each, Youngstown being required to spend over $30 million for recycling and Inland Steel agreeing (after months of trial) to build a $90 million waste-water recycling system at its giant steel mill in East Chicago, Indiana.

The Sanitary District's case against U. S. Steel Corp., Gary Works (defendant herein), stands as the major remaining hurdle to its attempt to insure the purity of Lake Michigan water for the citizens of the Chicago area.

Defendant's motion to stay or dismiss the Sanitary District's case pending a determination by the U. S. Environmental Protection Agency is understandable, but was unwarranted, and would, if granted, serve only to delay the trial and subsequent abatement of defendant's pollution-causing activities, to the obvious detriment of the health and welfare of the citizens of Greater Chicago. The doctrine of primary jurisdiction, upon

which the defendant relies, simply has no application to this case, and this Court should deny defendant's petition for certiorari so that the trial of this important matter may proceed with dispatch.

I.

THE UNDERLYING REASONS AND REQUIREMENTS FOR THE DOCTRINE OF PRIMARY JURISDICTION ARE NOT PRESENT IN THIS CASE.

The doctrine of primary jurisdiction is normally applied only in situations where a court and an administrative agency have *concurrent jurisdiction* and power to determine the same legal problem under the same legislative policy. *E.g., Far East Conf.* v. *United States*, 342 U. S. 570, 575 (1952); Schwartz, *Primary Administrative Jurisdiction and the Exhaustion of Litigants*, 41 Geo. L. J. 495, 499 (1953); Note, 66 Harv. L. R. 151 (1952). In such cases, the courts defer resolution of complicated factual questions to the agency's determination in order to provide *uniformity of construction* of the regulations in question, *e.g., Texas & Pacific Ry.* v. *Abilene Cotton Oil Company*, 204 U. S. 426, 440 (1907), and to utilize the *expertise* of the administrative agency, *e.g., Great Northern Ry.* v. *Merchants Elevator Co.*, 259 U. S. 285, 291 (1922).

However, the doctrine of primary jurisdiction should not be used to deprive courts of their traditional and constitutional judicial functions. *E.g., State ex rel. Shevin* v. *Tampa Electric Co.*, 291 So. 2d 45 (Fla. App. 1974); *Pottrock* v. *Continental Can Co.*, 210 A. 2d 295 (Del. 1965); *Stanton* v. *Trustees of St. Joseph's College*, 233 A. 2d 718 (Me. 1967). Therefore, where the purposes or reasons for the doctrine are not present in a specific case, the doctrine will not be applied. *United States* v. *Radio Corp. of America*, 358 U. S. 334, 350 (1959); *United States* v. *Western Pacific Ry.*, 352 U. S. 59, 63-4 (1956).

None of the purposes or requirements for the doctrine are present. *Uniformity* is not an issue because Congress has recognized the power of the states and local governments to set diverse and stricter standards for pollution control. Likewise, *uniformity* in the interpretation of federal regulations is not an issue, since the instant case is a common law nuisance action upon which the Environmental Protection Agency regulations have no bearing. Thus, there is no *concurrency* of jurisdiction by the Court and the Environmental Protection Agency over the specific question raised in this case—whether a defendant's activities constitute an abatable public nuisance. And very clearly, the outcome of the administrative proceedings will have no conclusive legal effect on the decision or the merits in the instant case. Finally, the resolution of complicated or technical questions in nuisance cases is, historically and actually, well within the competency of a court of equity, without the need to resort to alleged administrative *expertise*.

Since the reasons and requirements for the doctrine are not present, the doctrine of primary jurisdiction cannot be applied.

A. Uniformity in Interpreting Federal Regulations Is Not in Issue Since Congress and the Courts Have Recognized the Validity and Efficacy of Diverse and Stricter State and Local Standards and Remedies for Pollution Control.

Where uniformity of remedy is shown to have been clearly intended by Congress, or where such uniformity is necessary to effectuate the purpose of federal legislation, the courts should defer to the administrative agency. *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 437 (1907). Where, however, the administrative structure and the agency created by Congress are not intended to provide a pervasive and uniform remedy, the doctrine of primary jurisdiction does not apply, and courts are free to pursue traditional judicial remedies. *United States* v. *R. C. A.*, 358 U. S. 334, 350 (1959). As this Court said in *California* v. *Federal Power Commission*, 369 U. S. 482, 490 (1962):

> . . . Our function is to see that the policy entrusted to the courts is not frustrated by an administrative agency. Where the primary jurisdiction is in the agency, courts withhold action until the agency has acted. *Texas & Pac. R. Co.* v. *Abilene Oil Co.*, 204 U. S. 426. The converse should also be true, lest the antitrust policy whose enforcement Congress in this situation has entrusted to the courts is in practical effect taken over by the Federal Power Commission. . . .

The statute and administrative mechanism invoked by United States Steel in the instant litigation is the Federal Water Pollution Control Act, 33 U. S. C. §§ 1151, 1251 *et seq.*, and the administrative regulations promulgated thereunder by the United States Environmental Protection Agency. In this Act, Congress has clearly and unmistakably demonstrated its intention to allow —and, more importantly, *to encourage*—states and local governments to formulate additional, stricter standards for control of water pollution. In addition, the Act makes manifest the Congressional intent that the states will remain completely free to develop and enforce their own multi-faceted common law and statutory procedures and remedies for combating such pollution.

Thus, section 1251(b) of the Federal Water Pollution Control Act recites the Congressional policy "to recognize, preserve, and protect the *primary* responsibilities of States to prevent, reduce, and eliminate pollution" (33 U. S. C. A. § 1251(b)) (Emph. added).

Similarly, section 1370 makes clear the intention to reserve state and local power to set and enforce stricter standards.

> Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (a) any standard of limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard,

> prohibition, pre-treatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pre-treatment standard, or standard of performance which is less stringent then the effluent limitation, or other limitation, effluent standard, prohibition, pre-treatment standard, or standard of performance under this chapter . . . (33 U. S. C. A. § 1370).

Furthermore, in section 1365(e), Congress has declared:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or *common law* to seek enforcement of any effluent standard or limitation or to seek any other relief . . . (33 U. S. C. A. § 1365(e)) (Emphasis added).

The U. S. Environmental Protection Agency itself has recognized that its authority is not pre-emptive, and it has taken action to reinforce the reserved powers of the states. Thus, the very permit issued by that Agency to defendant gives warning that:

> 8. State Laws.
>
> Nothing in this Permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties established pursuant to any applicable State Law or regulation under authority preserved by § 510 of the Act (Permit No. 000281, p. 52 of 58, para. 8, C. 560).

The federal and state courts have also recognized that the federal legislative enactments have not pre-empted state and local control of water pollution as it affects local interests. *E.g., Ohio* v. *Wyandotte Chem. Co.*, 401 U. S. 493 (1971); *Illinois* v. *City of Milwaukee*, 406 U. S. 91 (1972); *Askew* v. *American Waterways*, 93 S. Ct. 1590 (1973); *Procter & Gamble* v. *City of Chicago*, 509 F. 2d 69 (7th Cir. 1975); *People ex rel. Scott* v. *City of Milwaukee*, 366 F. Supp. 298 (N. D. Ill. 1973); *U. S.* v. *U. S. Steel Corporation*, 356 F. Supp. 556 (N. D. Ill. 1973); *U. S.* v. *Ira S. Bushey & Sons*, 363 F. Supp. 110 (D. Vt. 1973); *Metropolitan Sanitary District* v. *U. S. Steel Corporation*, 41 Ill. 2d 440 (1969).

Thus, this Court has held that a state common law nuisance action can be maintained in a state court against an out-of-state polluter despite the existence of federal administrative remedies. *Ohio* v. *Wyandotte Chemical Corp.*, 401 U. S. 493 (1971) (see especially the opinion of Justice Douglas, 401 U. S. at 509-10). And in *Illinois* v. *City of Milwaukee*, 406 U. S. 91, 104 (1972), this Court held that the pre-1972 Water Pollution Control Act did not in any manner curtail the right of the states to use the common law nuisance remedy to abate interstate water pollution. Said the Court:

> The adoption of federal common law to abate a public nuisance in interstate or navigible waters is not inconsistent with the Water Pollution Control Act. Congress provided in § 10(b) of that Act that, save as a court may decree otherwise in an enforcement action, "[s]tate and interstate action to abate pollution of interstate or navigible waters shall be encouraged and shall not . . . be displaced by Federal enforcement action."

Judge Bauer of the United States District Court[1] synthesized the holdings of these and other decisions best when he said:

> ". . . [T]he Supreme Court and other courts repeatedly rejected the contention that the Federal Water Pollution Control Act preempted the right of states to seek *common law nuisance relief from water pollution in state or federal courts*. This consistent *rejection* was made in response to the specific argument that the Federal Water Pollution Control Act was a congressional attempt to create a *comprehensive* and *uniform* federal control program." (*People ex rel. Scott* v. *City of Milwaukee*, 366 F. Supp. 298, 299 (N. D. Ill. 1973) (Emph. added).

The federal regulations and the above cited cases make clear that there is, in fact, no one *uniform* system for combat-

1. Since elevated to the Circuit Court of Appeals, 7th Circuit.

ing water pollution. There is instead Congressional encouragement and recognition that states and local governments may use diverse remedies, and may seek to impose *stricter* standards on polluters and environmental despoilers. It cannot be seriously argued, therefore, that administrative determination is needed to insure uniformity in interpretation of pollution control measures.

B. Uniformity in Interpreting Federal Regulations Is Not in Issue Since the Instant Case Is a Traditional Common Law Nuisance Action, Upon Which the Federal Regulations Have No Bearing.

The doctrine of primary jurisdiction originated and is generally applied in cases where the court and agency are concurrently construing the same law, usually the statute which created the agency. *E.g.*, *Texas & Pacific Ry. Co.*, v. *Abilene Cotton Oil Co.*, 204 U. S. 426 (1907); *Far East Conf.* v. *U. S.*, 342 U. S. 570 (1951); *Pennsylvania Ry.* v. *Day*, 360 U. S. 548 (1959). In these instances, it is natural to defer the primary interpretation of the law to the agency primarily responsible for administering it. Moreover, in such cases, the administrative agency's findings will normally determine the outcome of the court litigation.

However, when the remedy sought is outside the statutory scheme, or when the agency lacks the power to determine the question or award a remedy, this Court has held that the doctrine of primary jurisdiction has no application. *E.g.*, *U. S.* v. *Radio Corp. of America*, 358 U. S. 334 (1959); *Eastern Ry.* v. *Littlefield*, 237 U. S. 140 (1915):

In the instant case, there is no concurrent jurisdiction by the court and the Environmental Protection Agency over the question presented. The action which defendant contends should be stayed is the District's common law nuisance action, seeking to abate defendant's pollution of the waters of Lake Michigan, to the detriment of the citizens of Chicago. A nuisance action

is a traditional, well-defined remedy in pollution cases, and involves a determination of whether defendant's activities are unreasonably interfering with the waters within plaintiff's jurisdiction. *Barrington Hills Club* v. *Village of Barrington*, 357 Ill. 11 (1934); *City of West Frankfort* v. *Fullop*, 6 Ill. 2d 609 (1955). The determination of the issue, however, does not involve the same or similar factors as would be important in the Environmental Protection Agency's Hearings on whether a permit should be issued, *e.g.*, *Stanton* v. *Trustees of St. Joseph's College*, 233 A. 2d 718 (Me. 1967). Thus, numerous cases have held that the mere existence of an administrative agency charged with the responsibility for setting and enforcing pollution control standards does not vest such agency with primary jurisdiction and thereby preclude courts from abating pollution by means of the common law nuisance remedy. *E.g.*, *State of Florida ex rel. Shevin* v. *Tampa Elec. Co.*, 291 So. 2d 45 (Fla. App. 1974); *United States* v. *Rohm & Haas*, 500 F. 2d 167 (5th Cir. 1974); *State* v. *Dairyland Power Cooperative*, 52 Wisc. 2d 45 (1971); c.f., *Metropolitan Sanitary Dist.* v. *U. S. Steel Corp.*, 41 Ill. 2d 440 (1968).

More importantly, the ultimate decision by the Environmental Protection Agency will have no legal effect on the outcome of the common law nuisance decision. Even if the Environmental Protection Agency were to grant U. S. Steel the modified permit it seeks, that agency's findings and permit would in no way immunize the defendant from responsibility for the nuisance caused by its activities. *New Jersey* v. *New York*, 75 L. Ed. 1176 (1931); *People* v. *City of Reedley*, 226 Pac. 408 (Cal. App. 1924); *Commonwealth* v. *New York and Pennsylvania Co.*, 367 Pa. 40 (1951); *Barrington Hills Club* v. *Barrington*, 357 Ill. 11 (1934); *Druce* v. *Blanchard*, 338 Ill. 211 (1930).

As this Court said in *New Jersey* v. *New York*, 75 L. Ed. 1176, 1179 (1931):

> There is no merit in defendant's contention suggested in its amended answer, that compliance with the [federal]

> supervisor's permits in respect to places designated for dumping of its garbage, leaves the court without jurisdiction to grant the injunction prayed and relieves defendant in respect of the nuisance resulting from the dumping. There is nothing in the Act that purports to give one dumping at places permitted by the supervisor immunity from liability for damage or injury thereby caused to others or to deprive one suffering injury by reason of such dumping of relief that he otherwise would be entitled to have.

Similarly, in *People* v. *City of Reedley*, 226 Pac. 408, 409 (Cal. App. 1924), the Court held:

> [T]he permit by the State Board of Health, unrevoked at the time of the trial, is not a conclusive or absolute defense; that such a permit is only evidence that the State Board of Health has granted to the defendant city the privilege of discharging sewage effluent into the waters of Kings River under certain specific conditions provided for by the rules and regulations adopted by the State Board of Health and issued after the State Board of Health has satisfied itself that such sewage will not be injurious. Such a permit does not authorize a city to create or continue a nuisance or in any wise limit the power of the court to abate the same in the event it finds that a nuisance exists or is being created or continued under the complained authority of the permit.

The Illinois Supreme Court has clearly held that a permit from a regulatory agency will not bar a suit to enjoin the permittee from its pollution activities. In *Barrington Hills Club* v. *Village of Barrington*, 357 Ill. 11 (1934), the Court held that the prior administrative proceedings before the Sanitary Water Board (the predecessor to the Illinois Environmental Protection Agency), which resulted in a permit to dump sewage into a stream, did not prevent the Village of Barrington from enjoining the dumping by the permittee. Accord, *Druce* v. *Blanchard*, 338 Ill. 211 (1930).

The U. S. Environmental Protection Agency has no power or jurisdiction to resolve the issue of whether defendant is

currently committing a public nuisance by its activities at Gary Works. Moreover, as the vast majority of cases have held, the fact that the Agency might find that its regulations are satisfied, and that a permit should be issued, cannot prevent the Illinois Court, applying traditional concepts of equity, from finding that defendant's acts constitute a nuisance. Therefore, a necessary factor for the application of primary jurisdiction is completely lacking.

C. The Resolution of Complicated and Technical Questions in Nuisance Cases Is, Historically and Actually, Well Within the Competency of a Court of Equity, Without the Need to Resort to Alleged Administrative Expertise.

One of the major purposes or reasons advanced for the doctrine of primary jurisdiction is to have the benefit of the expertise of administrative agencies in the resolution of technical factual questions. *U. S.* v. *Western & Pac. Ry.*, 352 U. S. 59 (1956).

It is well established, however, that the mere fact that evidence in a cause may be complicated or technical does not require deferring the case to the jurisdiction of an administrative tribunal.

Thus, in *U. S.* v. *Rohm & Haas*, 500 F. 2d 167 (5th Cir. 1974), the Court held that the complexity of the data necessary to decide a pollution nuisance case was not outside the competence of an equity court, and that the doctrine of primary jurisdiction did not require the plaintiff to first seek relief from the allegedly expert Environmental Protection Agency before proceeding.

The Court cogently observed:

> [T]he scientific, technical, and complex factual issues in the case bear on the kind of applicable relief that should be granted, rather than on whether the defendant is in violation of the Act. Discharges in violation of the Refuse Act may be completely halted by injunction and no reason

> appears why lesser steps may not be taken. (Citing cases). *The moulding (sic) of equitable relief, even in highly technical matters, is the proper concern of the courts.* Third, we agree with the United States that the data involved here is not inherently more complex than evidence routinely considered in anti-trust suits, patent actions and rate-settling adjudications. (500 F. 2d at 175).

In *State ex rel. Shevin* v. *Tampa Electric Company*, 291 So. 2d 45 (Fla. App. 1974), the Florida court also rejected an argument that the technical nature of the questions involved required deferring the matter to the expertise of the State Department of Pollution Control. The Court said that the mere fact that technical matters were involved in investigating defendant's activities and the methods for alleviating a nuisance did not require prior resort to administrative expertise. The Court further said that such considerations were irrelevant to an equity court's ability to decide if a nuisance existed and to fashion the necessary relief, for "certainly, the primary jurisdiction doctrine notwithstanding, highly technical matters per se are no strangers to the courts." (291 So. 2d at 48). See also, *State* v. *Dairyland Power Cooperative*, 52 Wis. 2d 45 (1971).

In the instant case, the question of whether defendant is or is not committing a public nuisance is no different than thousands of other nuisance suits which have preceded it in Illinois. The only difference may be that the nuisance defendant is charged with may be greater in degree. The trial judge has had vast experience in hearing pollution cases, and the parties will undoubtedly present expert testimony to aid the Court in its determination. (See *U. S.* v. *Rohm & Haas*, 500 F. 2d 167, 175 (5th Cir. 1974)). Equity courts have always been able to establish fair remedies in such matters.

Since there is no need to utilize the expertise of the U. S. Environmental Protection Agency, the second major purpose for the application of primary jurisdiction is missing, and the doctrine is therefore inapplicable.

CONCLUSION.

The clear policy of Congress has been to encourage and to stimulate state and local governments, as well as private citizens, to combat pollution by every means possible. While establishing broad federal regulations, Congress has nevertheless reiterated that such measures were not to be exclusive—that the states, local governments and courts were free to fashion diverse and stricter measures. The plaintiff, Metropolitan Sanitary District, has vociferously sought to protect the waters within its jurisdiction from contamination by industrial and private polluters, no matter where located.

However, if this Court were to accept defendant's position, there shall henceforth be only one uniform policy—that of the United States Environmental Protection Agency—to which all courts and governments must give deference. All proceedings instituted by public agencies and by private citizens would have to be brought initially before the United States Environmental Protection Agency, for its expert evaluation, and for a uniform interpretation. As shown above, such a conclusion does violence to the clear Congressional policy, and is in derogation of hundreds of years of equity jurisprudence in nuisance cases.

Moreover, acceptance of defendant's arguments will insure to it de facto immunity from local governmental control for many years, because of the automatic delay built into a system requiring initial resort to an agency, then to administrative review, before coming to an equity court for final relief. As Professor Bernard Schwartz has asked:

> Why should two actions have to be brought on what is really only one cause of action, when the court has the authority in the one proceeding to grant all the relief which is requested? Truly, to paraphrase Mr. Justice Frankfurter, this danger, if not likelihood, of thus marching the king's men up the hill and then marching them down

> again seems a mode of judicial administration to which one cannot yield concurrence.
>
> . . . Why should the plaintiff have to bring two actions on the one cause of action when the whole trend of our law, since the merger of law end equity, has been away from such facetious divisions of justice? *Primary Administrative Jurisdiction and the Exhaustion of Litigants*, 41 Geo. L. J. 495, 503-4 (1953).

The health and welfare of the citizens of Greater Chicago demand immediate protection, which only a court of equity can grant.

It is respectfully prayed that the defendant's Petition for Certiorari be denied.

Respectfully submitted,

ALLEN S. LAVIN,
100 East Erie Street,
Chicago, Illinois 60611,
312—751-5686,
Attorney for Respondent.

LEONARD M. RING,
111 West Washington Street,
Suite 1333,
Chicago, Illinois 60602,
312—332-1765,
Special Counsel.

Of Counsel:
LEONARD M. RING,
PHILLIP ROTHENBERG,
RALPH L. BRILL.